

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 11TH OCTOBER 2007 / 19TH ASWINA 1929

RFA.No. 8 OF 2003()

OS.39/2001 OF V ADDL. DISTRICT COURT, ERNAKULAM

APPELLANTS/DEFENDANTS 1 AND 2:

1. MOLCHAND GANGJI CHEDDHA, M/S. CANON
DOMESTIC APPLIANCES, 101, SANTHI MATH LINK ROAD,
DAHISAR EAST, MJUMBAI-68, REP. BY ITS POWER OF
ATTORNEY SMT.BETTY SEBASTIAN, W/O. SEBASTIAN,
M/S. CANON TECHNOLOGIES, 41/72 VALIYAPARAMBIL
BUILDING, MULLASSERRY CANAL ROAD, KOCHI. (DIED)
2. MR. SEBASTIAN, AGED ABOUT 40 YEARS,
41/72, CANON TECHNOLOGIES VALIYAPARAMBIL
BUILDINGS, MULLASSERRY CANAL ROAD, KOCHI.

ADDL. APPELLANTS:-

- 3 BHARATHI MOLCHAND CHEDDA,
W/O. LATE MULCHAND GANGJI CHEDDA,
M/S. CANAN DOMESTIC APPLIANCES, 101,
SHANTIMATH, LINK ROAD, DEHISAR (EAST), MUMBAI - 68.
4. NEHALI MULCHAND CHEDDA, AGED 21 YEARS,
D/O. LATE DO. DO. DO.
5. YASHIKA MULCHAND CHEDDA, AGED 13 YEARS, DO. DO.
6. RETAN MULCHAND CHEDDA, AGED 6 YEARS, S/O. LATE DO. DO.

(MINOR ADDITIONAL APPELLANTS 5 AND 6 ARE REPRESENTED BY MOTHER
BHARATHI MULCHAND CHEDDAH.)
(ADDITIONAL APPELLANTS 3 TO 6 ARE IMPEADED AS PER ORDER
DATED 28.7.2004 ON I.A. NO. 2178/2004.)

BY ADV. SRI.S.VENKATASUBRAMONIA IYER(SR.)
SRI.C.S.MANU
SRI.ANOOP JOSEPH

RESPONDENTS: PLARINTIFFS AND ADDL.DEFENDANTS 3 & 4:

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1. MINIKUMARI, W/O. ANILKUMAR,
AGED 30 YEARS, M/S. G & G AGENCIES,
HIGH 54, PANAMPILLY NAGAR,
COCHIN-36, COCHIN-36.
 2. NIMESH GULBACHAND CHEDDA,
PROPRIETOR, COOKWELL DOMESTIC APPLIANCES
147, C WING, STATION PLAZA, STAION ROAD
MUMBAI-400 078 REP. BY HIS POWER OF ATTORNEY
HOLDER MR.BHAWESH GULBACHAND CHEDDHA, M/S.COOKWELL
DOMESTIC APPLIANES, 147, C WING, STATION PLAZA.
 3. M/S. SANARA INDUSTRIES,
701, SAVITHA ENCLAVE, BESIDE SAMARPAN
BUNGALOWS, BODAKDEV, AHMEDABAD-380 015.
 4. M/S. PANJAVANI ENTERPRISES,
GROUND FLOOR-41, MADAR DARSHAN,
VAGHAWADI ROAD, BAHAR NAGAR, GUJARAT.

BY ADV. SRI.ABRAHAM JOHN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 5.9.2007, THE COURT ON 11/10/2007, PASSED THE
FOLLOWING:

P.R. RAMAN & V. K. MOHANAN, JJ.
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R.F.A NO. 8 OF 2003
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DATED THIS, THE 11th DAY OF SEPTEMBER, 2007.

J U D G M E N T

Raman, J.

This is an appeal filed against the judgment and decree in O.S. 39/2001 on the file of the Vth Additional District Court, Ernakulam. The appellants are defendants 1 and 2 and respondents 1 and 2 are the plaintiffs. Respondents 3 and 4 are the Additional defendants 3 and 4 in the suit. The first appellant died whose legal representatives are impleaded as Additional Appellants 3 to 6.

2. The suit is one for declaration that the sale of multi purpose cooking system "Cookwell" by the plaintiffs does not constitute an infringement of the patent right of the defendants for sale of their product "Canan Kinetiser" and that the threats advanced by the defendants against the plaintiffs with proceedings for infringement of patent through circulars, advertisements and communications is unjustifiable and a decree for injunction against the continuance of threats of infringements of rights and damages to the tune of Rs. 3 lakhs for the illegal interference.

3. According to the plaint averments, the first plaintiff is the distributor of multi purpose cooking system "Cook well" manufactured by the second plaintiff, that the first defendant is also a manufacturer of a multi purpose cooking system and the second respondent is actively involved in the business of the first defendant, that the first defendant's application for patent was opposed by the second plaintiff and finally an agreement was entered into between them on 24.8.1998 settling the dispute and agreeing that both parties are entitled to manufacture and sell the multi purpose cooking system without interference and notice of opposition was withdrawn by the second plaintiff before the authorities under the Patent Act and accordingly, the first defendant obtained certificate of patent on 30.12.1998 and that the Controller General of Patents had issued a registration of Design to the second plaintiff. It is alleged that the second defendant started threatening action against his entitlement of patent right and issued advertisements in news papers threatening action and also filed O.S. 29/2001 seeking injunction against the infringement of patent right. According to the plaintiff, the commission report in O.S. 29/2001 would show that there are marked difference between the products of both the parties, that they have not infringed the patent right of the defendants, that they have sustained a loss of Rs. 3 lakhs by the illegal interference in the

business by the defendants and hence a decree for declaration of non infringement of patent right of the defendants and an injunction against the continuance of threat of infringement of patent right and also for damages is liable to be passed in their favour.

4. In the joint written statement filed by the defendants, they contended that the suit is not maintainable, that none of the parameters applicable to a suit under Section 104 of the Patent's Act, 1970 can be invoked and the suit has to be treated as a simple suit for damages which has to be presented before the Sub Court, that the agreement referred to in the plaint is not enforceable in law as it is not a registered document, that admittedly, the second defendant's product was granted a patent and the plaintiff did not get any such patent, that the manufacturing or marketing of Cook-well by the plaintiff with the same technology and manufacturing process of the second defendant is therefore illegal and constitute to infringement of the patent right of the second defendant, that the defendants are entitled to protect their interest against false claim made by the plaintiff among the public and that they are entitled to approach the authority for protection of their interest in the patent.

5. Both suits were tried together. The plaintiffs in O.S. 39/2001 produced 19 documents which were marked as Exts.B1 to B19. On the

side of the defendants, 8 documents were produced and marked as Exts.A1 to A8. (Marking of these documents were obviously done in O.S. 29/2001) There was no oral evidence adduced by either side. The Commission report in O.S. 29/2001 is marked as Ext.C1 as court exhibit.

6. The court below, by its common judgment dated 28.2.2003, dismissed the suit O.S. 29/2001 filed by the appellants herein and allowed O.S. 39/2001 filed by the respondents 1 and 2. R.F.A. 7/2003 was filed against the judgment in O.S. 29/2001 which was ultimately settled between the parties as per the award of the Lok Adalat. The court below, after referring to the commission report, came to the conclusion that "Canan Kinetiser", which is a brand name used by the appellants and Cook-well appliances manufactured by the second respondent are different. The Advocate Commissioner appointed, who was the Assistant Professor in Government Model Engineering College, Thrikkakara, among other things, reported that the products are almost similar excepting the change in the maximum temperature (350 degree) and considerable change in the operating expenses (20% against 65% claimed by the appellant). The court below went on to hold that it is obvious that the change in the maximum temperature is different in both the products and the operation expenses is cheaper in the appellants' product compared to gas cylinders, by

65 % whereas the operational expenses in the respondent's product is cheaper by 20% compared to gas cylinders, that the body of both the products are differently shaped, that the body of 'Canan Kinetiser' is in a square shape with round corners made of mills, seal and painted with polyurethane whereas Cook well which is the product of G & G Agencies who is the respondent herein, is having a square body with fibre glass and the size and aesthetic are also different, that operating controls are similar in both the products and that therefore, it cannot be said that the product manufactured by the plaintiff and the defendant are using the same technical specifications and having same technical features. Therefore, it was declared that the second respondent herein is not making, selling or distributing a multi purpose cooking system having the same technical features and specifications of "Kanan Kinetiser" manufactured by the appellants herein. However, no damages was awarded as claimed in O.S. 39/2001. The suit O.S. 29/2001 filed by the appellants herein was dismissed and O.S. 39/2001 was decreed declaring that the sale of multi purpose cooking system "Cook well" by the plaintiff in O.S. 39/2001 does not constitute an infringement of the patent right of the defendants therein in the manufacturing and sale of their product "Canan Kinetiser". The defendants were also restrained from making any derogatory statements or

advertisements regarding multi purpose cooking system "Cook well" and interfere with the right of the plaintiff to continue the business of manufacture and sale of their cooking system . Challenging the said decree passed by the court below, the defendants have preferred this appeal.

7. According to the learned counsel appearing for the appellants, the decision of the court below that "Cook well" and Canan Kinetiser manufactured by the second plaintiff and the first defendant respectively are different, stems from a mis-appreciation of the facts and relating to the process of manufacture of the items in question and further, it is contrary to the expert opinion rendered in the matter. According to him, in the absence of any other material available on record, the opinion of the expert as revealed by the Advocate Commissioner's report would clearly show that both are the same and in so far as the second defendant has obtained a patent for their product, namely, 'Kinetiser' the declaration as sought for by the plaintiffs ought to have been rejected. In this connection, they also placed reliance on the facts that the other appeal RFA 7/2003 was settled between the parties, the terms of which would clearly show that the respondents have waived their right, if any, under the judgment. Further, even though the respondents had registered the design of their article subsequent to the patent obtained by the appellant, the registration was

revoked.

8. As per the plaint averments in O.S. 39/2001, the first plaintiff is only a distributor whereas the second plaintiff is the manufacturer of the cooking system "Cook well". The appellants/defendants admittedly are in the field of manufacturing of multi purpose cooking system in the trade name of hot plate. The first defendant is the manufacturer and it is marketed through the second defendant. But the first defendant is thus engaged in the manufacture of a multi purpose cooking system by name "Canan Kinetiser". They applied for registration of patent before the authorities under the Patent Act. On notice, the plaintiff opposed the same. There was a subsequent agreement between the parties and thereafter, the opposition was withdrawn and eventually, patent was granted. According to the plaintiff, the grant of patent in favour of the defendant will in not in any way, affect the agreement between the parties dated 24.8.1998 as per which both the parties are entitled to manufacture and sale hot plates ie. multi purpose cooking system without mutual interference. But admittedly, the objection having been withdrawn, patent was eventually granted by the statutory authority in favour of the defendant. The effect of grant of a patent, in such circumstances, is to be considered in the light of the provisions contained in the Act. According to the plaintiffs, under the

Design Act the second plaintiff has obtained a registration certificate registering their design. But according to the defendants/appellants the said registration has been revoked which fact is brought to the notice of this court, in their affidavit filed in support of the stay petition. It is averred in para 4 of the affidavit that during the pendency of the suit, the Assistant Controller of Patents and Designs, as per order dated 10.2.2003, cancelled the registration of design granted to the second respondent/second plaintiff upon the application made by the first petitioner therein. It is relevant to note that in the counter affidavit filed, there is no specific denial of these facts. On the other hand, it is averred that the design certificate mentioned in para 4 of the affidavit has no relevancy in the present dispute. According to them, proceeding is going on before appropriate forum. Further, in the other suit O.S. 29/2001 filed by the appellants herein, seeking a decree of permanent prohibitory injunction from making, selling and distribution the multi purpose cooking system by the first respondent herein (who who is the defendant therein) on the ground that both the cooking systems are having the same technical features, the fact that "Canan Kinetiser" manufactured by the appellants have a patent is highlighted. It is also averred that a patent has also been obtained in respect of the appellant's "Canan Kinetiser" under the Patent Act. Though the suit was dismissed, in

the appeal AFA 7/2003, the matter was settled between the parties. It has to be noticed that the appellant in the present appeal (RFA 8/2003) - Molchand Gangji Cheddha died during the pendency of the appeal and his legal representatives were got themselves impleaded in the appeal.

9. As per the settlement, it is contended that the distributor herein have agreed not to make, sell and distribute the multi purpose cooking system having the same technical features and specifications of the product "Canan Kinetiser" in respect of which late Molchand Gangji Cheddha had patent granted by the Controller of Patents, Government of India, during the period of validity of the patent and which has been transferred in the names of the additional respondents herein by operation of law. It is also agreed that the claim in O.S. 39/2001 will be withdrawn by the defendants therein which is the subject matter in this appeal. Likewise, parties have also agreed to withdraw and give up their contentions in O.S.29/2001 and in RFA. 7/2003. But a statement as such is not filed yet. Hence this Court cannot at this stage mould the relief according to the settlement. But the fact remains that the court below proceeded as though both the goods manufactured by the appellant and that by the first respondent is different which finding is not based on the expert opinion as we have already discussed above.

In view of the patent granted in favour of the first appellant the agreement if any prior thereto and the effect of the same has to be considered in the light of the provisions contained in the statute governing the grant of the patent. In the circumstances, we set aside the decree and judgment of the court below and remand the case for fresh consideration.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-

RFA 8/2003

:11:

P.R. RAMAN &
V.K. MOHANAN, JJ.
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R.F.A. NO. 8 OF 2003
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DATED: 11.10.2007.

J U D G M E N T